IN THE HIGH COURT OF UTTARAKHAND, AT NAINITAL.

Criminal Appeal No. 170 of 2007
(Old No. 2304 of 1986)

1- Shiv Charan S/o Babu
2- Om Prakash S/o Shiv Charan,
Both R/o Mahuakheraganj,
Kashipur, District Naianital
(now U.S. Nagar) ..Appellants.

Vs.

State of U.P. .. Respondent.

Sri S.P.S. Panwar, learned Senior Advocate, for the appellants.
Sri H.C. Pujari, learned Addl. G.A. for the State.

Dated: November 15, 2007

Hon'ble B.C. Kandpal, J.

This criminal appeal, U/S 374 of the Cr.P.C. has been filed by the appellants, against the judgment and order dated 25.3.1986, passed by Ist Additional Sessions Judge, Nainital in S.T. No. 12 of 1986, whereby the appellants have been convicted U/S 304/34 I.P.C. and both of them have been sentenced to undergo R.I. for eight years.

2- The prosecution story, in brief, is that Harkesh Singh, informant, got certain land on patta within the circle of Village Mahuwakheraganj and the accused Shiv Charan, resident of the same village used to throw and collect dearth there on the said land. Harkesh Singh wanted to construct his house there on the patta land, hence repeated attempts of Harkesh Singh to get the dearth removed from patta land were frustrated by accused Shiv Charan. Therefore, Harkesh Singh made a complaint to the Patwari of the Circle on 31.5.1985. The Patwari of the circle visited the place in the morning on 31.5.1985 and made measurements there and then asked the accused Shiv Charan not to throw and

collect dearth there on the patta land of Harkesh Singh. The accused started reprimanding Harkesh Singh. Meanwhile village men intervened and Harkesh Singh returned to his village home. The same day at 6 P.M. when Smt. Dallo, mother of Harkesh Singh was passing through the road in front of the house of accused Shiv Charan, the accused Shiv Charan and his son accused Om Prakash rebuked Smt. Dallo. At this Smt. Dallo scolded both the accused in consequence of which the accused persons picked up Dandas lying on the spot and bet her and inflicted injuries on her person. Due to the injuries sustained by Smt. Dallo, she fell unconscious there on the spot and subsequently died soon afterwards. Harkesh Singh along with other villagers took Smt. Dallow to the Police Station, Kashipur and lodged the written report, Ext. Ka.1, at about 8:15 P.M. On the basis of written report, check report, Ext. Ka.12 was prepared at the Police Station. The same day case U/S 308, 504 I.P.C. was registered against the accused persons in the G.D., carbon copy of which is Ext. Ka.14. According to the prosecution case the incident of Marpit was witnesses by Bhagwan Singh, Ram Kumar and other villagers.

3- The case was investigated by Sri Teeka Ram Sharma, S.I. He visited the place of occurrence and prepared site plan, Ex. Ka.6. The autopsy on the dead body was conducted by S.I. Jaidev Singh Arya. He after completing the formalities sent the dead body for post-mortem. On transfer of S.I. Teeka Ram Sharma, the investigation was transferred to S.I. Prithvi Singh, who after completing the investigation, submitted charge sheet, Ext. Ka.5

against the accused persons for the offence U/S 304 I.P.C.

4- The postmortem on the dead body of Smt. Dallo Devi was conducted by Dr. Anil Kumar Loomba, of L.D. Bhatt Hospital, Kashipur on 1.6.1985 a 1.15 P.M. and found the following anti-mortem injuries on her person:-

1- A contusion over left back 8cm x 3cm, 10cm below the inferior angle of scapula about 8cm lateral to the mid line.

2- Contusion over antero-medial aspect with abrasion over it of left lower leg 7cm x3cm, 10cm below the poplieteal line.

3- A small abrasion 1cm x .75 cm over anterior aspect of right lower leg 5cm below the tibial tuberosity.

4- A small abrasion over anterior aspect of interphalongeal joint (distal), .75cm x .5cm of right firstoe.

5- A small abrasion over anterior aspect of distal interphalongeal joint of second toe right side .5cm x .5cm in dimension.

Abdominal cavity was full of blood. Spleen was enlarged, about 950 Gms. Badly lacerated. The cause of death was due to shock and heamorrhage because of splenic rupture.

4- The A.C.J.M. Kashipur, vide his order dated 20-11-1986 committed the case U/S 302/34 I.P.C. to the Court of Sessions for trial.

5- The accused/appellants were charged U/S 302/34 I.P.C. They pleaded not guilty and claimed to be tried.

6- The prosecution to bring home guilt to the accused, examined P.W.1, informant Harkesh Singh,

P.W.2, Bhagwan Singh, an eye witness, P.W.3, Dr. Anil Kumar Loomba, P.W.4, Brij Kishore scribe of the written information, P.W.5, Ram Kumar an eye witness, P.W.6 Constable Santosh Kumar, P.W.7, S.I. Prathvi Singh and P.W.8, Teeka Ram Sharma who conducted the investigation in the case.

7- The accused persons in their statement U/S 313 Cr.P.C. denied the prosecution case and have stated that they have been falsely implicated in the case. They also alleged that Patta has been executed in favour of Harkesh Singh to the land belonging to them and Smt. Dallo Devi wanted to grab and misappropriate their land and as such false case has been made against them.

8- The learned Sessions Judge after having gone through the evidence on record and hearing learned counsel for the parties found both the accused guilty for the offence U/S 304 I.P.C. read with Section 34 I.P.C. and both of them were sentenced to eight years R.I.

9- Feeling aggrieved the accused/appellants have preferred this appeal.

10- I have heard the learned counsel for the parties and have gone through the record.

11- The learned counsel for the appellants has submitted that the Medical Officer found spleen of the deceased Smt. Dallo weighing to 950 Grams whereas the normal weight of spleen is 120 Grams, therefore, the deceased has died due to rupture of enlarged spleen and the accused persons have been

falsely implicated in order to grab the land of the accused/appellants. He also argued that the deceased had fallen down due to her own and sustained injuries and her spleen got ruptured. He also submitted that the seat of injuries inflicted to Smt. Dallo Devi is not such which may indicate that the accused/appellants had intention or knowledge to commit the culpable homicide.

12- On the other hand learned Additional G.A. has opposed the submission raised by the learned defence counsel and urged that the eye witnesses examined in the case have categorically deposed about the assault made on the deceased by the accused/appellants. The accused/appellants had also full knowledge about the enlarged spleen of the deceased and they intentionally caused injuries to the deceased resulting her death.

13- P.W.3, Dr. Anil Kumar Loomba, has conducted the post-mortem on the dead body of deceased Smt. Dallo Devi on 1.6.1985 at about 1.15 P.M. in the Govt. Hospital Kashipur. He has found two contusions and three abrasions on her body. According to him abdominal cavity was full of blood. The spleen was enlarged about 950 grams and it was badly ruptured. The cause of death was due to shock and haemorrhage because of splenic rupture. According to this witness the normal spleen becomes 120 grams. Therefore, from the medical evidence one thing has become quite clear that the death of Smt. Dallo Devi had occurred due to rupture of enlarged spleen.

14- Now it is to be seen as to whether the spleen had ruptured due to the injuries caused to Smt. Dallo Devi by the accused/appellants or by her fall on some rocky surface. Dr. Anil Kumar Loomba, (P.W.3) in his cross-examination has specifically mentioned that the spleen was ruptured due to injury no.1 sustained by her. Although this witness in his further cross-examination has admitted that the injury No.1 could be caused by fall on some stone but in this case this possibility has been ruled out from the side of the prosecution by adducing eye witnesses account.

15- P.W.1, Harkesh Singh has deposed that the accused persons used to throw garbage on his 'patta' land. He told them to remove their garbage collected on his land but they did not pay any heed to his requests. Therefore, on 31.5.1985 at about 10-11 A.M. on his complaint, Patwari came to his village and he reprimanded the accused. At this accused abused him. On the same day at about 6 P.M. when his mother Smt. Dallo was passing near the house of the accused, the accused persons started abusing her. She scolded them. At this the accused persons picked up the Dandas and started beating her. The accused also beat her with stone pieces. Due to which she fell unconscious. According to this witness the incident was also seen by Bhagwan Singh and Ram Kumar. On raising alarm by this witness, other persons reached at the spot and took Smt. Dallo to Kashipur for treatment. In the way Brij Kishore also met him and he narrated the incident to him also. He got scribed the written report from Brij Kishore and handed it over at the Police Station. This witness has proved the written

report, Ext. Ka.1. He also deposed that soon after reaching the hospital his mother had died. He also deposed that treatment of spleen of her mother was going on from 4-5 years before. This fact was known to the accused as well as to all the villagers from before.

16- P.W. 2, Bhagwan Singh is the independent eye witness of the occurrence. He has supported the prosecution version. According to him on 31.5.1985 at about 6 P.M. he was coming to his home from the forest and he heard the noise of accused Shiv Charan and Om Prakash. When he reached nearer he saw that accused Shiv Charan and Om Prakash were beating Smt. Dallo Devi with Dandas. He intervened, at this the accused ran towards their house leaving the Dandas at the spot. This witness further deposed that on receiving Dandas blows Smt. Dallo had fallen down. He also deposed that the incident was also witnessed by Harkesh and Ram Kumar. This witness further deposed that Smt. Dallo Devi was a patient of spleen and her treatment was going on from 5-6 years before. He also deposed that the factum of illness of the deceased was known to the village people including the accused persons. This witness has been cross-examined at length but nothing has come out from it which may turn his statement unreliable. No suggestion has been given to this witness as to why he would falsely depose against the accused.

17- P.W. 5, Ram Kumar is also the eyewitness of the occurrence. This witness has fully corroborated the statements of P.W.2, Bhagwan Singh and P.W. 1, Harkesh Singh. No suggestion has

been given to this witness from the side of the accused as to why he would depose falsely against them.

18- From the evidence of the above three eyewitnesses, it has amply been proved that the accused/appellants have assaulted Smt. Dallo Devi with Dandas having knowledge of her ailment of spleen.

19- So far as the motive to commit the crime is concerned, it has come in the statements of the witnesses that the disputed land was given on lease to the complainant Harkesh Singh and there was dispute between the accused and the complainant side pertaining to removal of dearth collected on the 'patta' land by the accused persons. The witnesses also stated that in the morning on the date of the incident Circle Patwari also visited the 'Patta' land and he had asked the accused/appellants to remove the dearth. The accused Shiv Charan also abused Harkesh Singh. Therefore, the accused/appellants had motive to assault Smt. Dallo Devi, mother of the complainant. No suggestion has been given to the witnesses that the 'Patta' land belongs to the accused/appellants and the complainant wanted to grab their land. It appears that this theory of grabbing the land has been developed in the statement U/S 313 Cr.P.C. to make up a case for their false implication.

20- It is also pertinent to mention here that the first information report of the incident had been lodged without unreasonable delay. The occurrence is said to have taken place on 31.5.1985 at about 6

P.M. and the F.I.R. was lodged the same day at about 8.15 P.M. P.W.4, Brij Kishore is the scribe of the F.I.R. This witness has deposed that he had prepared the F.I.R., Ext.Ka.1 on the dictation of Harkesh Singh. Due to prompt lodging of the F.I.R. there remains no occasion for false implication and embellishment.

21- Now the question remains, which offence the accused have committed. As concluded in the earlier part of the judgment, the accused persons had knowledge about the spleen ailment of Smt. Dallo Devi, the deceased, and despite this fact they have assaulted her, due to which she died. However, the intention of the accused/appellants to commit the culpable homicide not amounting to murder punishable under Section 304 I.P.C. has not been established from the prosecution side. No threat or utterance of the accused to cause her death has been alleged by the prosecution witnesses and it is also not the case of the prosecution. Therefore, in the facts and circumstances of the case, the offence committed by the accused/appellants, falls under Section 304 Part-II I.P.C. instead of Section 304 Part-I I.P.C. It is not proved from the evidence available on record that the accused persons have the intention to cause such bodily injuries as is likely to cause the death, rather it is established that even if the accused persons had no intention to cause such bodily injuries as was likely to cause death but had the knowledge that the injury was likely to cause death. The accused persons are, therefore, guilty for the offence committed by them U/S 304 Part-II I.P.C.

22- The learned defence counsel also cited before me the judgment dated 17-4-2006, rendered by the Division Bench of this Court, in criminal appeal No. 2042/2001 and contended that in the cited case the death of the deceased had occurred due to rupture of spleen and the accused/appellants were acquitted of the charge U/S 302/34 I.P.C. and were convicted U/S 323/34 I.P.C. He, therefore, contended that the ratio of the cited case is fully applicable to the facts of the instant case also.

23- I have gone through the cited judgment and find that the facts in the cited case are entirely different as in that case the deceased was a person having good health and his spleen was also normal. The court, therefore, came to the conclusion that it was not possible that by the strike of kick and fists only the spleen could be ruptured, but in the instant case the facts are totally different. It has come in the evidence that the deceased was an old and fragile lady and her spleen was enlarged and this fact was known to every person of the village. The doctor has also not ruled out the possibility of rupturing the spleen with the strike of Danda and bricks, as has been alleged by the prosecution witnesses. The medical evidence is not out-rightly ruling out the ocular version. It is the settled law that where there is any contradiction between ocular version and medical evidence then the ocular version will prevail. The incident has occurred in the day light and the prosecution version finds support by the eye-witnesses and the medical evidence is not completely ruling out the possibility of inflicting the injuries on the person of the deceased by the assault of lathi and stones. As has been stated in the earlier part of the

judgment that both the accused have been assigned the role of giving lathi blow and assaulting the deceased with bricks also, which caused injuries on her person. The doctor has specifically stated in the evidence that the injuries could have been caused by the assault of lathi as well as stones. The post mortem report in this case also indicates that the spleen of the deceased was badly ruptured and it could have been only on account of the injuries sustained by the deceased.

24- In the aforesaid circumstances the ratio of the cited judgment cannot be applied in the instant case.

25- For the aforesaid discussion I come to the conclusion that the prosecution has been able to prove its case for the offence U/S 304 –II I.P.C. read with Section 34 I.P.C. instead of Section 304 Part-I, read with Section 34 I.P.C.

26- The appeal is, therefore, partly allowed. The accused/appellants Shiv Charan and Om Prakash are held guilty U/S 304 – II I.P.C. read with Section 34 I.P.C. instead of offence U/S 304 Part-I read with Section 34 I.P.C. Both the accused/appellants are sentenced to undergo five years R.I. for the offence U/S 304- II read with Section 34 I.P.C. instead of eight years R.I. U/S 304 Part-I read with Section 34 I.P.C. The impugned judgment and order stands modified accordingly.

27- Both the accused/appellants are on bail. Their bail bonds are cancelled and sureties

discharged. They be taken into custody forthwith, to serve out the sentence awarded to them.

28- Let the file immediately be transmitted to the trial Court concerned for compliance.

(B.C. Kandpal, J.)

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